EXHIBIT I

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re	)	B194663
	)	
JUSTO ESCALANTE,	)	(Super.Ct.No. BH 003993)
	)	(David S. Wesley, Judge)
on Habeas Corpus.	)	
	)	ORDER
	)	

THE COURT:*

The petition for writ of habeas corpus has been read and considered.

The petition is denied. The record shows that the circumstances of petitioner's aggravated mayhem offense "exceed the minimum elements necessary to sustain a conviction" of that offense. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1070-1071, 1094 -1095.) The injuries inflicted upon the victim were far greater then the minimum element of injury necessary to constitute the offense. The motive for the offense was trivial and inexplicable. The victim was rendered particularly vulnerable when he was kicked and beaten to the ground by four men immediately before being stabbed by petitioner. Petitioner had a significant prior history of criminal conduct and committed the aggravated mayhem while on probation for a prior offense. Petitioner refuses to acknowledge responsibility for the offense. Petitioner has not completed a vocational training course or demonstrated a marketable employment skill. These factors constitute "some evidence" that petitioner remains a danger to the community and overcome the positive factor that he has not been disciplined during his imprisonment.

* WILLHITE, Acting P. J., MANELLA, J., SUZUKAWA, J.

ORIGINAL

MC-275

OCT 31 2006

Name Justo Esc.
Address CTF Central, F-Wing 302
P.O. Box 689
Soledad, Ca. 93960-0689
CDC or ID Number E-91258

B194663

COURT OF APPEAL - SECOND DIST.
FILED
OCT 31 2006
JOSEPH A. LANE Clerk
S. LUI Deputy Clerk

X-Ref B059513 (4) a/d B180187 (4) W/d

California Court of Appeals
Second Appellate District
(Court)

Justo Escalante
Petitioner
vs.
J. Davis, Chairman, Board of Parole Hearings; J. Tilton, Director, California Department of Corrections & Rehabilitation; B. Curry, Warden CIF, et al.
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. B194663
(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- ~~If you are filing this petition in the Superior Court, you need file only the original unless local rules~~ require additional copies. Many courts require more copies.
- ~~If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy~~ of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 [Rev. July 1, 2005]

Penal Code, § 1473 et seq.; Cal. Rules of Court, rule 60(a)
American LegalNet, Inc. www.USCourtForms.com

Assigned to DIVISION FOUR

This petition concerns:

☐ A conviction ☒ Parole

☐ A sentence ☐ Credits

☐ Jail or prison conditions ☐ Prison discipline

☒ Other *(specify)*: Board failed to give petitioner a parole date in violation of state and federal law.

1. Your name: Justo Escalante

2. Where are you incarcerated? Correctional Training Facility - Soledad State Prison

3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Aggravated mayhem; use of weapon

b. Penal or other code sections: Penal Code 205; 12022(B)

c. Name and location of sentencing or committing court: Los Angeles County Superior Court, 210 W. Temple St., Los Angeles, Ca. 90012-3210

d. Case number: PA004647

e. Date convicted or committed: 4-18-91

f. Date sentenced:

g. Length of sentence: 7 years to life plus one year

h. When do you expect to be released? Minimum eligible release date was May 29, 1998

i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

D. Blum, Public Defender

4. What was the LAST plea you entered? *(check one)*

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other:

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." *(if you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)*

Please See Page 4-A et seq attached

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

Please See Page 4-A et seq attached

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

Please See Page 4-A et seq attached

PREAMBLE

This habeas petition alleges constitutional violations that occurred at petitioner's fourth parole hearing held by the Board Parole Hearings (Board) on December 15, 2005. The Board, for the fourth time, denied petitioner parole who is serving a sentence of 7 to life for aggravated mayham (a non-homicide offense), a parolable offense, that occurred in April of 1991. Petitioner's minimum eligible parole date for release was set for May 29, 1998. (Exhibit D page 1:4-15, 1:19-20).

To fully inform this court on the chronological history of petitioner's prior parole hearings, the Board's reasons for previous parole denials and Board's recommendations to be found suitable for parole which has led up to petitioner's fourth parole hearing and his fourth parole denial despite petitioner's attempts, who enter this prison system **completely unable to speak and understand the English language**, to accomplish demands made by the Board to be found suitable, petitioner submits the following factual events:

I. Petitioner's First Parole Hearing Held on May 1, 1997

Petitioner took before the Board self help accomplishments to include, a teacher's helper in Adult Basic Education, improving education skills, and assisting other inmates, studying towards his GED. (Exhibit A page 12:3-8), Alcoholic and Narcotics Anonymous participation, (Exhibit A page 14:7-27,15:1-27), and a disciplinary free program (Exhibit A page 11:21-22). The

prison psychologist stated that if petitioner "would be able to stay off drugs and alcohol, he may very well be a person that is not violent prone." (Exhibit A page 16:23-24). Despite the aforementioned, the Board denied petitioner parole for two years stating:

> "The offense was carried out in a cruel and callous manner with a disregard for the suffering of others in a dispassionate, calculated manner. These conclusions are drawn from the statement of facts wherein the prisoner and his crime partners attacked the victim and the prisoner stabbed the victim in the eye which resulted in permanent damage. The prisoner had an escalating pattern of criminal conduct which included two offenses for transporting or selling illegal drugs.... The prisoner has failed to develop a marketable skill that could be put to use upon release and he is not sufficiently participated in in beneficial self help and therapy programs. The prisoner should be commended for having participated in an educational upgrading, ABE II and III, and he's also participated in AA and NA. However, these positive aspects of his behavior do not outweigh the factors of unsuitability.
>
> ¶ The panel recommends that the prisoner becomes or remain disciplinary free, continue to upgrade educationally and vocationally, participate in available self help and therapy programming." (Exhibit A page 28:9-26, 29:1-8, 30:1-4).

II. Petitioner's Second parole Hearing Held on May 10, 2001

For the second parole hearing, petitioner took before the Board another disciplinary free program (Exhibit B page 22:4), his G.E.D. diploma, work as a chapel porter and continuos A.A. and N.A. program since 1995. (Exhibit B page 22:10-27, 23:1-

27, 24:1-8, 33:17-20). The prison psychologist stated that, if released, petitioners violence potential "is considered to be no more than the average citizen in the community." (Exhibit B page 25:12-13). Despite the aforementioned, the Board denied petitioner for two years stating:

> "The commitment offense was carried out in an especially cruel manner. It was carried out in a manner which demonstrated an exceptional callous disregard for human suffering. And the motive for the crime was inexplicable or very trivial in relation to the offense. These conclusions are drawn from the statement of facts wherein the inmate had gotten in an argument with the victim, James Brooks, James Brooks, claims that he had known the inmate prior to this. And the inmate pulled the knife. Brook retreated, however, he slipped or tripped. He went down. Mr. Escalante's friends kicked him, hit him, and the inmate stabbed him in the right eye. (Exhibit B page 43:12-25).
>
> ¶ The inmate does have a previous record. He did fail to profit from society's attempts to correct his criminality. Those attempts included adult probation. He has unstable social history and prior criminality which includes drug use and an illegal entry into the United States. He has several arrests, however, three convictions. Two of those are for control substance for which he is serving additional commitment on. One of them is a misdemeanor plus a firearm, which he said must be another case of mistaken identity, as it was not him. However, he does admit to the two controlled substance charges. The prisoner institutionally has been programming. (Exhibit B page 44:6-19).
>
> ¶ He should be commended for his participation in AA and NA and the 12 steps, also for never having a 115. He's definitely to be commended for that. He did completed his GED last year 10/ 2000. According to the inmate he is on a waiting list for a vocation. And all those are very, very, good signs towards positive programming, which I will say that he is doing. (Exhibit B page 45: 11-18)
>
> ¶ The Panel recommends that the prisoner remain

> disciplinary-free, that if available to upgrade vocationally and also self help and therapy programs." (Exhibit B page 46:15-19).

III. Petitioner Third Parole Hearing Held on May 27, 2003

For the third parole hearing petitioner took before the Board another disciplinary free program, placement on the waiting list for vocation, a GED, numerous self help groups, to include STI, HIV/AIDS, and Hepatitis program, a 13-week Impact program and religious service attendance, and NA-AA attendance since 1995. (Exhibit C page 21:12-14, 22:7-11, 22:16-27, 23:1-11, 23:24-25, 24:4-6, 26:1-2). The prison psychologist stated that if release, petitioner's "violence potential is considered to be no more than the average citizen in the community." (Exhibit C page 28:26-27, 29:1-2). Despite the aforemention, the Board denied petitioner parole for two years stating:

> "The offense was carried out in an especially cruel, vicious manner. The offense was carried out in manner which demonstrates an exceptionally cold hearted disregard for human suffering wherein, the prisoner had gotten into an argument with the victim, James Brooks. And the prisoner pulled a knife. The — Mr. Brooks retreated; however, he slipped and tripped. He went down and Mr. Escalante's friends kicked him -- and the prisoner stabbed him in the right eye. (Exhibit C page 44:15-26).
>
> ¶ He's failed to upgrade vocationally as previously recommended by the Board, as well as he's not sufficiently participated in beneficial self help and therapy programming at this time. The psychosocial report was adequate. Parole plans was adequate.... (Exhibit C page 46:3-10).
>
> ¶ [T]he prisoner should be commended for taking self help groups in terms of Sexually Transmitted Diseases. He completed the Impact program, as well as he's participated in NA. He's on the waiting list currently for computers. He had positive work reports as a porter, as well as he in the past, 2000 I believe was the accurate date, completed his GED. (Exhibit C page 47:6-13).
>
> ¶ [R]ecommendations to you, Mr. Escalante, are to remain

> disciplinary free, if it's available to you, to upgrade vocationally and educationally, as well as if it's available to you participate in beneficial self help programming to better understand the causative factors on why you're before us here today...." (Exhibit C page 49:1-7).

IV. Petitioner's fourth Parole Hearing At Issue Held On December 15, 2005

For the fourth parole hearing, petitioner took before the Board another disciplinary free program, parole plans, a home to live in and two job offers, good work reports, AA and NA self help therapy and Impact program self help participation. (Exhibit D page 23:!-27, 24:1-7, 25:1-7, 30:1-19, 35:15-22, 36:1-27, 45:1-2). Despite the aforementioned, the Board denied petitioner parole for two years stating:

> "Sir one of the main factors that we took into consideration is the gravity of the offense in that after reviewing the facts of the crime, it is the opinion of this Panel that the offense was carried out in an especially cruel and callous manner in that the victim was hit and kicked and knocked to the ground. Once he was on the ground, the record reflects that you grabbed him by the hair and stabbed him in the eye resulting in the loss, permanent loss, of sight in that particular eye as well as a frontal lobotomy. The offense was carried out in a dispassionate and caculated manner.... (Exhibit D page 42:12-17).
>
> ¶ The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.... (Exhibit D page 42:23-25).
>
> ¶ [Y]ou were arrested on a number of occasions prior to the commitment offense.... One of those offenses resulted in a condition for which you were sentence, a felony conviction for which you were sentenced to 180 day in jail.... (Exhibit D page 44:3-13).
>
> ¶ The record reflects that you have an unstable social history and prior criminality as previously outlined which includes the arrest and or convictions that were previously noted to include the use of marijuana and cocaine. (Exhibit D page 44:20-24).
>
> ¶ Again, the most recent psychological report is not totally supportive of release, and furthermore, it is somewhat contradictory in that it indicates that if you were to be release to the community, your risk would be minimal However, the doctor firmly states that any, that you deny

any responsibility and that you need to develop some insight or at least a reasonable explanation before being cosidered for parole. (Exhibit D page 49:2-11)

¶ [y]ou need to participate in more self help and therapy in order to help you come to terms with the underlying cause of the commitment offense in that even though you are not required to discuss or admit to the commitment offense, you still need to be able to demonstrate some sort of insight when you come before this panel.... (exhibit D page 52:1-9)

¶ Nevertheless, sir, we would like to take this opportunity to commend you for not having received any 115's throughout the entire time that you have been incarcerated. That's very commendable. We understand that it can be difficult for you to maneuver through these shark infested waters within the institution not incurring any 115's, so we certainly commend you for having the ability and the skill not incur any disciplinary while within the institution. Sir, we'd also like to commend you for your continued participation in AA, NA.... (Exhibit D page 52:13-26).

¶ We recommend, if you're able to do so, you complete at least one trade.... Also,... immerse yourself in any and all self help that maybe available within the institution. If there is nothing available, then we would recommend that you go to library.... (Exhibit D page 53:4-6, 54:5-9).

CLAIM I

THE BOARD'S DENIAL OF A PAROLE DATE FOR THE FOURTH TIME BASED ON PETITIONER'S CONDUCT PRIOR TO IMPRISONMENT TO JUSTIFY DENIAL OF PAROLE VIOLATES PETITIONER'S LIBERTY INTEREST IN PAROLE AND EXPECTATION IN RECEIVING A PAROLE DATE VIOLATING DUE PROCESS OF LAW UNDER THE 14th AMENDMENT TO THE U.S. CONSTITUTION

At petitioner's fourth hearing the Board relied on petitioner's conduct prior to imprisonment, to include the commitment offense, to deny parole. (Exhibit D pages 42-48). Petitioner's conduct prior to imprisonment, to include the commitment offense, was also used at petitioner's three prior parole hearings to deny parole. (See Exhibit A page 28-29, B page 43-44, and C page 44-45). The denial of parole at petitioner's fourth parole hearing was done regardless of petitioner's exemplary behavior for the past 15 years of incarceration and evidence of rehabilitation as stated in the above preceding pages at petitioner's first, second, third, and fourth parole hearings. Petitioner submits that this fourth denial of parole based on his conduct prior to imprisonment violated due process of law.

Post Dannenberg cases (In re Dannenburg 34 Cal.4th 1061 (2005)) indicate this to be true. As the recent Court of Appeals wrote in In re Scott 133 Cal.App.4th 573, 34 Cal.Rptr.3d 905 (2005) regarding the continuos use of the conduct prior imprisonment wrote:

> "The Governor's assumption that a prisoner may be deemed unsuitable for release may be deemed unsuitable for release on the basis of the commitment offense 'alone' is correct, (Rosenkrantz, supra, 29 Cal.4th at p. 682) **but the proposition must be properly understood.** The commitment offense is one of only two factors indicative of unsuitability,

> a prisoner can not change (the other being his 'previous record of violence'). Reliance on such an immutable factor 'without regard to or consideration of subsequent circumstances' may be unfair (In re smith (2003) 114 Cal.App.4th 343,372), and runs contrary to the rehabilitative goals espoused by the prison system and could result in due process violation.' (Biggs v Terhune, supra, 334, F.3d at p. 917). The commitment offense can negate suitability only if the circumstances of the crime reliably established by evidence in record rationally indicate that the offender will present an unreasonable public risk if released from prison. Yet, the predictive value of the commitment offense may be very questionable after a long period of time (Iron v Warden of California State Prison - Solano (E.D. Cal. 2005) 358 F.Supp.2d 936, 947,fn.2.)." (id. at p. 919-920)
>
> "The Governor states in his decision that the gravity of Scott's offense is alone a sufficient basis 'on which to conclude that his release from prison **at this time** would pose an unreasonable public risk.' That statement could be repeated annually until Scott dies or is rendered helpless by the infirmities of sickness or age." (id. at p. 919-920 fn. 9 (emphasis in original)).
>
> "It is worth noting, as our Supreme Court (People v Martishaw 1981) 29 Cal.3d 733, 768, disapproved on other grounds in People v Boyd (1985) 38 Cal.3d 762), that a large number of legal and scientific authorities believe that, even where the passage of time is not a factor and the assesment is made by an expert, predictions of future dangerousness **are exceedingly** unreliable." (id. at p. 920 fn. 9; (Petition for Review was denied in Scott on November 30, 2005, 2005 DJDAR 13803)).

In re Shaputis, 37 Cal.Rptr.3d 324, 135 Cal.App.4th 217 (2005), relying on Biggs v Terhune., 334 F.3d 910, 916, (9th Cir. 2003), which is another post Dannenburg case, wrote:

> "[A]lthough reliance on conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements by state law where inmate over time continues to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of prior conduct would raise serious quetions involving his liberty interest in parole" (id at p. 335, citing also, Irons v Warden of California State Prison Solano (E.D. Cal. 2005) 358 F.Supp.2d 936, 947 and fn.2).

Shaputis held that reliance on a parole applicant's "former lifestyle" prior to imprisonment to deny parole, that such reliance on such an "historical relic" is an "arbitrary and capricious [decision] within the differential standards articulated by Rosenkrantz, supra, 29 Cal.4th 616." (Shaputis,supra, 37 Cal. Rptr.3d at 335).

Even the court in In re Rosenkrantz, 29 Cal.4th 616 (2002), indicated that the Board may not indefinitely rely on the nature of the offense to find petitioner unsuitable for parole. A close examination of what the California Supreme Court stated in Rosenkrantz illuminates this reasoning:

> "The nature of the prisoners offense, alone can constitute a sufficient basis for denying parole, (In re Minnis, supra, 7 Cal. 3d 639, 647; In re Ramirez, supra, 94 Cal.App.4th 549, 569, In re Seabock (1983) 140 Cal.App.3d 29, 36-37.) **Although the parole authority is prohibited from adopting a blanket rule that automatically excludes parole for individuals who have been convicted of a particular type of offense**, the authority properly may weigh heavily the degree of violence used and the amount of viciousness shown by a defendant. (Rosenkrantz, supra, 29 Cal.4th at 682-683 [emphasis added]).

The emphasized portion applies equally well to prohibit blanket rules against petitioner. (id. at 682 [recognizing inmate has a protected right to be "considared **on an individual basis**"], emphasis in original).

Rosenkrantz not only recognizes a due process "liberty interest" in parole (id. at 654, 661), it also recognizes that petitioner has a right to individual consideration of parole aimed at determining whether petitioner presents an unreasonable risk to the public if he is release on parole. The crime's facts may be considered, but not if it makes a blanket rule that petitioner is unsuitable for parole.

This reasoning is in line with Biggs v Terhune, 334 F.3d 910 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals upheld that the Board's reliance on the sole factors of the commitment offense to deny parole to a prisoner at

his minimum eligible parole date, despite an intervening period of exemplary conduct. Nevertheless, the Biggs court stated:

> "[T]he parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be **initially justified** as fulfilling the requirements set forth by the state law. Overtime, however, should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Bigg's offense and prior conduct would raise serious questions involving his liberty interest in parole." (Biggs, supra, 334 F.3d at 916).
>
> "A continue reliance in the future on an unchanging factor, the circumstances of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." (id. at 917).

In line with Biggs regarding continuous use of precommitment factors to deny parole is contrary to due process, the Court in Irons v Warden of California State prison -Solano, 358 F.Supp.936 (E.D. Cal. 2005), wrote:

> "[C]ontinuous reliance on unchanging circumstances transforms an offense for which California law provides eligibility for parole into a de facto life imprisonment without the possibility of parole. The court asks rhetorically — what is it about the circumstances of petitioner's crime or motive which are going to change? The answer is nothing. The circumstances of the crime will always be what they were, and petitioner's motive for the committing them **will always be trivial.** Petitioner has no hope for ever obtaining parole except perhaps that a panel in the future will arbitrarily hold that the circumstances were not that serious or the motive was more than trivial. Given that no one seriously contends lack of seriousness or lack of triviality at the present time, the potential for parole in this case is remote to the point of non-existence. Petitioner's liberty interest should not be determined by such an arbitrary, remote possibility.
>
> In the instant case, the BPT has apparently relied on these unchanging factors at least **four prior times** in finding petitioner unsuitable for parole. Petitioner has continued to demostrate exemplary behavior and evidence of rehabilitation. 334 F.3d at 916. Under these circumstances, the continued reliance on these factors... violates due process." (id. at 947).
>
> "¶ To a point it is true, the circumstances of the crime and motivation for it may indicate a petitioner's instability, cruelty, impulsiveness, violent tendencies and like. However, after **fifteen or so years** in the caldron of prison life, not exactly an ideal therapeutic environment to say the least, and after repeated demonstrations that despite the recognized hardships of prison,

> this petitioner does not possess those attributes, the predictive ability of the circumstances of the crime **is near zero.**" (id. at 947 fn.2).

In Masoner, infra, for example the court held that "the BPT's refusal to grant a parole date and repeated failure to provide post commitment support for the decisions [had] violated Masoner's liberty interest and due process rights." (Masoner v State, 2004 WL 1080177 (C.D. Cal. 2004) ["[A]lthough a commitment offense can provide some evidence to justify the initial denial of parole date, subsequent denials in the face of exemplary behavior and overwhelming evidence of rehabilitation raises serious questions involving an inmate's liberty interest in parole." citing, Biggs, 334 F.3d at 919]).

Furthermore, yet another district court recently explained the rational of why continuous use of the commitment offense and conduct prior to imprisonment violates due process as follows:

> "Whether the facts of the crime of conviction, or other unchanged criteria, affect the parole eligibility decision can only be predicated on the 'predictive value' of the unchanged circumstances. Otherwise, if the unchanged circumstances per se can be use to deny parole eligibility, sentencing is taken out of the hand of judge and totally reposited in the hands of the BPT. That is, parole eligibility could be indefinitely and forever delayed based on the nature of the crime even though the sentence given set forth the possibility of parole -- a sentence with the fact of the crime fresh in the mind of the judge. While it would not be a constitutional violation to forego parole altogether for certain crimes, what the state cannot constitutionally do is have a sham system where the judge promises the possibility of parole, but because of the nature of the crime, the BPT effectively deletes such from the system.
>
> ¶ Nobody elected the BPT commissioners as sentencing judges. Rather, in some realistic way, the facts of the unchanged circumstances must indicate a present danger to the community if released, and this can only be assessed not in a vacuum, **after four or five eligibility hearings, but counter poised against the back drop of prison events,"** (Bair v Folsom State Prison, 2005 WL 2219220, *12n.3 (E.D. Cal. 2005) report and recommendation adopted by 2005 WL 3081634 (E.D. Cal. 2005)).

In the circumstances of petitioner's case, the Board's reliance upon the

facts of petitioner's crime and his prior conduct violates due process. (Exhibits A page 28-29, B page 43-44, C page 44-45,and D page 42-48). First, continued reliance upon these unchanging factors makes a sham of California's parole system and amounts to an arbitrary denial of petitioner's "liberty interest in release on parole," "expectation that he will be granted parole," and his "presumption that parole release will be granted." (See Mc Quillion v Ducan 306 F.3d 895, 902 (9th Cir. 2002); Biggs, supra, 334 F.3d at 914-915; Rosenkrantz, supra, 29 Cal.4th at 654, 661). Petitioner has been denied parole on four different occasions. Continued reliance upon these unchanging factors amounts to converting petitioner's parolable offense to a term of life without the possibility of parole. (See, e.g., Irons, supra, 358 F.Supp.2d at 947 ["continuos reliance on the unchanging circumstances transforms an offense into a de facto life imprisonment without the possibility of parole"]; Scott, supra, 34 Cal.Rptr.3d at 919-920, 133 Cal.App.4th at 594-595; Shaputis, supra, 37 Cal.Rptr.3d at 335). Second, the circumstances of the crime and petitioners conduct prior to imprisonment do not amount to some evidence supporting the conclusion that petitioner **"currently"** poses an unreasonable risk of danger if released. (See, In re Smith 114 Cal.App.4th 343, 370, 372 [evidence must show "that a prisoner currently would pose an unreasonable risk of danger if release at this time."]; Shaputis, supra, 34 Cal.Rptr.3d at 334-335 [same]). Upholding the recital of the commitment offense and conduct prior to imprisonment as the Board has done to deny petitioner parole for the fourth time, "converts a court reviewing the denial of parole into a potted plant. "(In re Scott (2004) 119 Cal.App.4th 871, 898). In the parole context, the requirements of due process can only be met if "some evidence supports the decision" and the evidence underlying the decision is supported by "some indicia of rehability." (Biggs, supra, 334 F.3d at 914; Caswell v Calderon 363 F.3d 832, 839 (9th Cir. 2004); Scott, supra, 119 Cal.4th at 899; Superintendent v Hill 472

U.S. 445, 455-457 (1985)).

While it may have been reasonable to rely on petitioners offense and conduct prior to imprisonment as an indicator of dangerousness for some period of time, continued reliance on such unchanging circumstances -- after 15 years of incarceration and four (4) parole suitability hearings -- violates due process because these factors now lack predictive value with regards to petitioner's present and future dangerousness. After 15 years of rehabilitation in which petitioner's minimum eligible parole date for release passed on May 29, 1998, (Exhibit D page 1:19-20), the ability to predict petitioner's future dangerousness based simply on the circumstances of the crime and petitioners conduct prior to imprisonment is nil. (See, Irons, supra, 358 F.Supp.2d at 947 n.2 ["four prior times in finding [Mr. Irons] unsuitable for parole " and "after 15 years" imprisonment, ability to asses dangerousness "is near zero."]; Scott, supra, 133 Cal.App.4th at 595, 34 Cal.Rptr.3d at 919-920 ["the predictive value of the commitment offense may be very questionable after a long period of time."]).

Petitioner's record is replete with evidence of petitioner's rehabilitation, including positive psychological reports, correctional counselor reports, extensive self improvement through education and A/A and N/A advances as well as therapy and disciplinary free incarceration. (See Exhibit A page 11:21-22, 12:3-8, 14:7-27, 15:1-27, 16:23-24; B page 22:4, 22:10-27, 23:1-27, 24:1-8, 25:12-13, 33:17-20; C page 21:12-14, 22:7-11, 22:16-27, 23:1-11, 23:24-25, 24:4-6, 26:1-2, 28:26-27, 29:1-2; D page 23:1-27, 24:1-7, 25:1-7 30:1-19, 35:15-22, 36:1-27, 45:1-2). As the Board stated:

> "We would like to take this opportunity to commend you for not having received and 115's throughout the entire time that you have been incarcerated. We certainly commend you for having the ability and the skill to not incur any disciplinaries while in the institutions. Sir, we'd also like to commend you for

> the multiple laudatory chronos in your file as well as for your continued participation in NA, AA." (Exhibit D page 52:13-26).

While the Board may initially have been entitle to rely upon the commitment offense and petitioner's conduct prior to imprisonment to find petitioner unsuitable for parole, under these circumstances, petitioner submits that the continued reliance on these pre-conviction factors do not now constitute "some evidence" with "some indicia of reliability" of petitioner's current dangerousness. (See, Hill, supra, 472 U.S. at 455; Bigss, supra, 334 F.3d at 917; Irons, supra, 358 F.Supp.2d at 947; Masoner, supra, 2004 WL 1080177 *1-2; Bair, supra, 2005 WL 2219220, *12 n.3.; Scott, supra, 133 Cal.App.4th at 594-595, 34 Cal.Rptr.3d at 919-920; Shaputis, supra, 37 Cal.Rptr.3d at 334-335).

CLAIM II

THE COMMITMENT OFFENSE (A NON-HOMICIDE OFFENSE) DOES NOT RISE TO THE LEVEL OF "ESPECIALLY HEINOUS OR CRUEL MANNER" TO JUSTIFY A PAROLE DENIAL FOR THE FOURTH TIME; THERE WAS NO EVIDENCE SHOWING PETITIONER WAS A "CURRENT" THREAT IF RELEASED VIOLATING DUE PROCESS OF LAW

A). The Offense Does not Rise To "Especially Heinous, Atrocious Or Cruel Manner" To Deny Parole

Regarding the crime itself, as stated by the Board that petitioner "stabbed [Mr. Brooks] in the eye," was committed in an "especially cruel and callous manner" -- invoked California Code of Regulations, title 15 § 2402(c)(1) (Hereafter CCR), as justification to deny parole. (Exhibit D page 42-44, 46-47). To support their conclusions the Board held the offense was "carried out in a dispassionate and calculated manner," (See, 15 CCR § 2402(c)(1)(B)), which states:

> "The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder." (See, Exhibit E).

Petitioner's offense, while callous, was not even a murder let alone an "execution style murder" as required by this subsection. Also the Board stated that the offense "was carried out in a manner which demonstrated an exceptionally callous disregard for human suffering," (See, 15 CCR § 2402(c)(1)(D)), which states:

> "The offense was carried out in a manner which demonstrates an exceptional callous disregard for human suffering." (See, Exhibit E).

The Board stated that it "does accept true the findings of the court. We are not here to retry your case. "(Exhibit D page 9:8-11). Petitioner was convicted of "aggravated mayhem with use of a deadly weapon." (Exhibit D page 1:15). Even though petitioner was convicted of

stabbing the victim in the eye, the Board's continuous mention of Mr. Brooks been hit and kicked -- there was never **any** evidence that petitioner hit or kicked Mr. Brooks. (Exhibit D page 42:17-18, 43:21-22, 46:8). Petitioner **never** hit or kicked the victim. (See Exhibit D page 13:16-17, C page 10:10, 14:3, 44:24-26, B page 39:17-19, 43:24-25, A page 8:1-2).

In determining whether petitioner committed the offense in an "exceptionally callous" manner the law is clear that the Board is only authorized to consider whether "[t]he **prisoner** committed the offense in an especially heinous, atrocious or cruel manner." (15 CCR §2402(c)(1); Exhibit E; In re Ramirez 94 Cal.App.4th 549, 570 (2001); In re Smith 109 Cal.App.4th 489, 504 (2003)). The Board's sole legally sufficient reference to petitioner's alleged actions directly with the victim was that petitioner stabbed the victim in the eye. (Exhibit D page 42:20-21, 43:23-24, 46:24). While the offense may have been callous, the offense was not murder. While to deny parole an offense must be "exceptionally callous," regarding murder, the court in In re Scott 119 Cal.App.4th 871, 891 (2004), stated:

> "[A]ll second degree murders by definition involve some callousness - i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and suffering of others. [Citation]. As noted, however, parole is the rule, rather than the exception. And a conviction for second degree murder does not automatically render one unsuitable." (id., citing In re Smith 114 Cal.App.4th 343, 366 (2003)).

In the recent post Dannenberg case, In re scott, supra, 133 Cal.App.4th 573, 34 Cal.Rptr.3d 905 (petitioner for review denied), the court held that the "unsuitability determination **must** be predicated on 'some evidence' that the particular circumstances of the [prisoner's crime]... indicated exceptional callousness and cruelty with trivial provocation." (id. at 922, citing Dannenberg, supra, 34 Cal.App. at 1098).

In Scott, Mr. Scott, armed with a handgun, went looking for his wife and her boyfriend. When Mr. Scott found them, he approached the boyfriend and purposely shot him three times hitting the victim in the head and thigh in front of Scott's 13 year old son, his wife and "others," in which a stray bullet could of easily struck an innocent bystander. (id. at 908).

The scott court found that the offense was not committed "in an dispassionate and calculated manner... or in a manner demonstrating an exceptional callous disregard for human suffering." (id. at 922 citing also the connected case of In re Scott I 119 Cal.App.4th 871, 889-892 (2004)). Using illustrations for an explanation, the court wrote:

> "For example, premeditation was considered in Rosenkrantz because, the prisoner had been convicted only of a second degree murder, the evidence showed 'a full week of careful preparation, rehearsal and execution .' and that the prisoner, who 'fire 10 shots at close range from an assault weapon and fire at least three or four shots into the victim's head as he lay on the pavement,' carried out the crime with 'planning, sophistication or professionalism.' (Rosenkratz, at p.678). Similarly, the evidence of premeditation relied on in In re Lowe (2005) 130 Cal.App.4th 1405, which also involved a second degree murder conviction, showed that the prisoner purchase a gun shortly before the murder, entered his victims bedroom in the middle of the night while he was asleep, unsuspecting, and in a special relationship of confidence and trust with his killer, and shot him five times in the head and chest, execution style.' (id. at p. 1414). As the court stated, this evidence showed the murder 'was a cold-blooded execution' and that the prisoner's egregious acts [were] far more aggravated than the minimum necessary to sustain a second degree murder conviction.' (id. at p. 1415). In In re Deluna, supra, 126 Cal.App.4th 585, the petitioner, convicted of second degree murder, had a physical confrontation with the victim and shot him in the mouth and, as the victim bled and walked around the parking lot, followed him and continued firing until he died. The court of Appeal determined that 'the initial wounding and deliberate stalking of a defenseless victim can reasonably be characterized as especially cruel and callous. (id. at p. 593)." (Scott, supra, 34 Cal.Rptr.3d at 922-923).

Accordingly, the following cases are examples of homicides not rising to the level of crimes committed in an especially heinous, atrocious, or cruel manner to deny parole: Smith, supra, 114 Cal.App.4th at 350-351, 366-367 [victim shot at close range "in the head" and twice more as she was falling to the floor," "shot Ms. Garner in the head three times" was not an especially grave crime to support a denial of parole]; Scott, supra, 119 Cal.App.4th at 891-892 and fn. 11, 893, 895 fn.14 [shooting the victim three times at close range in front of a child was not an exceptional callous crime to support a denial of parole at the second parole hearing]; In re Smith 109 Cal.App.4th 489, 492, 506 (2003) [victim shot twice, severely beaten, and drowned, court held crime was not committed in an especially heinous, attrocious, or cruel manner to deny parole]; In re Van houten 116 Cal.App.4th 339, 364-365 (2004) [member of the Charles Manson cult, was convicted of two murders where the husband and wife were subjected to hearing each other being killed by stabbing. All in an attempt to incite a race war; was a particular agregious crime to deny parole]; Dannenberg, supra, 34 Cal.App.4th at 1095 [evidence permitted to the conclusion that the defendant bludgeoned his wife multiple times with a pipe wrench to the point of incapacitating her and then drowned her or allowed her to drown in the the bathtub, was a particular egregious crime to deny parole].

As previously stated herein, petitioners alleged direct involvement in the offense was that he stabbed Mr. Brooks in the eye, which compared to the above cited cases can not be deemed "exceptionally callous disregard for human suffering." (Exhibit D page 43:4-7). Also, it is interesting to note that the victim, Mr. Brooks, after the alleged offense occurred, that Mr. Brooks himself was convicted of serious offenses warranting prison incarceration. (See, Exhibit C page 37:14-27, 38:1-14, 40:8-10). While the offense may be callous, labeling this non homicide offense can not reasonably be deemed "exceptionally callous" to deny parole for the fourth time, especially when petitioner has surpassed the "matrix" maximum time

to be served on such offense which calls for "11-12-13" years -- petitioner has now served 15 years imprisonment. (See, 15 CCR § 2403(d) III C: Exhibit F; Exhibit D page 40:8).

B). There Is No previous Record of Violence To Deny Parole

On this subject, the Board denied parole based on prior "criminal Activity." (Exhibit D page 44:2-20, 48:1-18). While the Board mentions "arrests," petitioner was only ever "convicted," other than the instant commitment offense, of controlled substance violations and a misdemeanor. (Exhibit D page 16:7-27, 17:1-9). The authority for denial of parole on such subject is found in 15 CCR § 2402(c)(2) which states:

> "previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age." (See, Exhibit E).

In the instant case, petitioner has no juvenile record. (Exhibit D page 16:7-8). Petitioner was never "convicted" of "violence" in nature offenses. (Exhibit D page 1:20-22); In re Smith 109 Cal.App.4th 489, 505 (2003) [Board must show a prisoner was "convicted" of a violent felony to deny parole based on this criteria]). Petitioner was never convicted of a violent felony, other than the instant offense. Furthermore, reliance on any arrest is improper because evidence of such arrest does not meet the test of relevant, reliable information which the Board must base its parole decision. (15 CCR § 2402, subd.(b) ["All relevant reliable information ... shall be considered"]). The Board may **only** consider a record of violence which is "reliably documented." (id.) In a system in which a defendant is considered innocent until proven guilty, an arrest can not

legally be sufficient proof of guilt. (See, Penal code § 1096; People v Calloway 37 Cal.App.3d 905 (1974) [Arrests alone are not reliable evidence]; Estelle v Williams 425 U.S. 501, 503 [same]). As such, this was not "some evidence" containing "an indicia of reliability." (Scott, supra, 34 Cal.Rptr. 3d at 917; Biggs, supra, 334 F3d at 915).

C). There Was No Evidence Use By The Board To Find Petitioner Had An Unstable Social History

To support a parole denial, the Board stated:

> "The record reflects that you have an unstable social history and prior criminality as previously outlined which includes the arrest and, or convictions that were previously noted to include the use of marijuana and cocaine." (Exhibit D page 44:20-24).

The authority to support a denial under the "unstable social history criteria" is found in 15 CCR § 2402 (c)(3) which states:

> "Unstable social history. The prisoner has a history of unstable or tumultuous relationships with others." (Exhibit E).

In <u>In re Deluna</u> 24 Cal.Rptr.3d 634 (2005), the Board denied parole based on prior substance abuse stating Deluna has, "An unstable social history." The court wrote:

> "On the general topic of defendant's social history, the Board found that the defendant has an unstable social history that included... A very severe alcohol problem, and you were carrying a loaded gun as a matter of routine." (id. at 650).

The Board went on to conclude that Deluna "began consuming alcohol at the age of 17." (id.). And that "On the day of the murder defendant had consumed a 40 ounce bottle of beer, a six pack of tall beer and three pitchers of beer." (id.). While the consumption of alcohol and initiation of the fighting occurred while in the bar with friends, (id. at 646), the court concluded:

> "Though there is some evidence that the defendant had an

> alcohol problem, there is no evidence that it contributed to 'a history of unstable or tumultuous relationship.'" (id. at 650).

Although a substance abuser may well have a history of unstable social relationships, there is no evidence of that here. As the record shows, the Board stated the previous use of marijuana and cocaine in and of itself showed unsunsuitability. Furthermore, the Board's statements that petitioner had an "unstable social history and prior criminality" alone is not enough to show petitioner is a **current** threat, 15 years after the offense to show petitioner is unsuitable for parole. (Exhibit D page 44:20-24, 40:8-9).

Under the rule of law what the Board must adhere to is that the evidence they use to deny parole **must** be based on "some evidence" that contain "an indicia of reliability" showing that petitioner is **"currently"** a threat. (See, Smith, supra, 114 Cal.App.4th at 370-372; Shaputis, supra, 37 CalRprt3d at 334-335; Scott, supra, 34 Cal.Rptr 3d at 917; Biggs, supra, 334 F.3d at 915). In this case , none of the above reasons is "some evidence" to show petitioner is a "**current**" threat, 15 years after the offense, to justify a denial of parole for the fourth time. Especially when petitioner has been disciplinary free his entire incarceration with no substance abuse nor antisocial behavior in the last 15 years. (Exhibit D page 40:8-9, 52:13-23; Smith, supra, 109 Cal.App.4th at 505 ["A prisoner prior addition is not an appropriate consideration in determining parole suitability "]; Smith, supra, 114 Cal.App.4th at 371 [prior substance abuse is not evidence to show a prisoner is a "current" threat if released on parole]).

D). Pettioner's Parole Plans Were Adequate And Are Not Factors For Unsuitability Findings; The Psychologist Report Was Not A Basis For Unsuitability Findings Nor Was The District Attorney's Comments

As negative evidence to support a parole denial for the fourth time the Board stated that:

> "Again, the most recent psychological report is not totally supportive of release, and furthermore, it is somewhat contradictory in that it indicates that if you were release to the community, your risk would be minimal. However, the doctor firmly states that you deny any responsibility and that you need to develop some insight or at least a reasonable explanation before being consider for parole. In terms of your parole plans, sir, we do note for the record that you do have realistic parole plans in that more likely than not... you will be deported to Honduras, and we do have letters in your file that support your parole plans to live with your brother and, or cousin upon your release to parole." (Exhibit D page 49:2-19, 45:10-22).
>
> "However, the record reflects that you have not completed any vocations throughout the entire time you have been in prison. And although you have taken advantage of some self help programs with in the institution, sir, you have not specifically participated in beneficial self-help specifically to address the issue of insight. (Exhibit D page 45:1-10, 48:1-10, 48:19-26, 49:19-25, 52:1-10)
>
> "Sir, the Hearing Panel notes that responses to Penal Code Section 3042 indicate an opposition to the finding of parole suitability by the District Attorney...." (Exhibit D page 51:1-4).

The Board stated that the psychologist reasoned that "if petitioner would be released to the community, [his] risk would be minimal," **not** an "unreasonable risk of danger to society if released from prison." (15 CCR § 2402, subd.(a); Exhibit E). Thus, the psychologist supports release. Both Penal Code § 5011(b) and 15 CCR § 2236 states that the "Board shall not require an admission of guilt to any crime" and "a prisoner refusal to discuss the offense shall not be held against the prisoner." But yet the Board stated "that even though you are not required to discuss or admit to the commitment offense, you still need to be able to demonstrate some sort of insight when you come before this Panel, and you have not done that," as well as denying parole based on petitioner's "need to develop some sort of insight or at least a reasonable explanation before being considered

for parole." (Exhibit D page 52:5-9, 49:7-11, 45:20-22). Petitioner exercised his right not to discuss the commitment offense. (Exhibit D page 10:16-19). The Boards demand that petitioner must "develop some insight or at least a reasonable explanation before being consider for parole" is in direct violation of Penal Code 5011(b) and 15 CCR § 2236, and is therefore not legally sufficient evidence to deny parole.

As to "parole plans," petitioner has a home to live in and a job in Honduras. (Exhibit D page 23:2-27, 24:1-7, 25:1-7). 15 CCR § 2402(d)(8) states:

> "Understanding and plans for the future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release." (See, Exhibit E).

In the instant case, petitioner has realistic plans for release, i.e., a job and home to live in. Furthermore, 15 CCR § 2402(c) is strictly "circumstances tending to show unsuitability," while 15 CCR § 2402(d) is circumstances tending to show suitability." (See Exhibit E). Here, the Board used a factor that should be used to find suitability for parole and turned it around to find petitioner unsuitable. The Boards demand that petitioner obtain a vocation despite being on the vocation waiting list since 2000, after petitioner received his GED, is **not** a factor to be used as a finding of unsuitability. (15 CCR § 2402(d); Exhibit E; See also Exhibit D page 28:7-27, 29:1-9). Furthermore, no where in the statutory (Penal Code § 3041) nor regulatory provisions (Cal.Code Regs. tit 15 § 2402 et seq.), does it state that the Board may find petitioner "unsuitable" because he has insufficiently participated in institutional programming, including vocational training and self-help programming. (Exhibit D page 45:2-10,

48:19-26, 52:1-2). This is an illegal application of the law because no law exists giving such authority to find petitioner unsuitable for parole. (See, Cal.Cod.Regs. tit 15 § 2402 et seq.; Exhibit E). Therefore, this is not "some evidence" to deny parole for the fourth time and is an illegal application of law, viz., no law exists giving such authority to find petitioner "unsuitable" for parole.

Secondly, parole suitability does not rest on the question of if a parole applicant's "institutional programming, including vocational and self-help" as stated by the Board are sufficient for the Board's demands. The sole question on parole suitability is if a "prisoner currently would pose an unreasonable risk of danger if released at this time." (In re Smith, 114 cal.App.4th 343, 370, 372, (2003), citing Cal.Code Regs. tit 15 § 2402 subdivision (a)); Dannenberg, supra, 34 Cal.4th at 1070 [Board must show that the inmate poses a "continuing danger to the public."]; Shaputis, supra, 37 Cal.Rprt.3d at 334-335). Nothing in the record states the Board believes or even suggests that petitioner would pose a "current" threat to society regarding his institutional programming, including vocational training and self-help.

Even "assuming there may be some connection between [petitioner's] ... limited vocational training, the Board did not established how this ... makes him unsuitable as a threat to public safety." (In re Deluna, 126 Cal.App.4th 585,598, 24 Cal.Rptr.3d 643, 652 (2005)).

Thirdly, California Penal Code § 3041(b) comtemplates that a parole denial may only be based if the Board

> "Determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, can-not be fixed at this meeting." (See, also, McQuillion, supra, 306 F.3d at 901).

Nowhere does Penal Code § 3041 parole statute drafted by the legislature

state that "institutional programming , including vocational and self-help" that do not measure up to the Board's demands authorize the Board to use these factors as such for finding of unsuitability requiring a "more lengthy period of incarceration."

California Code of Regulations, title 15 § 2402 et seq., itself does not authorize "insufficient institutional programming, including vocational training and self-help" that do not rise up to the Board's demands as a basis of "unsuitability." (See, Exhibit E). But even if it did authorize the Board to use those factors, it would provide no legal authority for for doing so if they excuse the scope of the Board's power under statute. (See, In re Stanley, 54 Cal.App.3d 1030, 1036 (1976) ["A cardinal principle hold that administrative regulations must conform to the enabling law; that an administrative agency has no discretion to exceed the authority conferred upon it by statute."]).

California Penal Code § 3041(b) "creates a presumption that parole release will be granted." (McQuillion, supra, 306 F.3d at 902), and creates "an expectation that [petitioner] will be granted parole." (Rosenkrantz, supra, 29 Cal.4th at 654). Nowhere in Penal Code § 3041 or the Board's regulations does it even state or authorize a finding of "unsuitability" when "institutional programming, vocational training, and self-help do not meet up to the Board's demands. As such this does not trump petitioner's "presumption that parole release will be granted" and his "expectation that [he] will be granted parole" and is not "some evidence" under the current state of applicable legal provisions for finding of unsuitability.

Furthermore, under the statutory and regulatory provision, the Board must parole petitioner unless it finds he currently presents an unresonable risk of danger to society if parole. (In re Smith, 114 Cal.App.4th 343,

370, 372 (2003), citing Cal. Code Regs. tit., 15 § 2402 (a); Dannenbeg, supra, 34 Cal.4th at 1070 [evidence must show petitioner poses a "continous danger to the public safety]; Shaputis, supra, 37 Cal.Rptr.3d at 334-335 [Board must show a "current" threat]).

There is no evidence in the record that shows petitioner "currently" poses an unreasonable risk to society 15 years after the offense occurred. The Board has pointed to no evidence showing a "nexus" between the crime and petitioner's potential for violence 15 years later to show petitioner "currently" poses an unreasonable risk to society if release. (See, In re George Scott, supra, 34 Cal.Rptr.3d at 916, 926 [Board and Governor apply a "nexus" rationale to the offense and conduct of the prisoner; Exhibit D).

The Board held that petitioner has "not incur any disciplinaries while within the institution," and stated, "We'd also like to commend you for the multiple laudatory chronos in your file as well as for your continued participation in AA/NA," obtaining a "GED," and acknowledged petitioner's risk assessment was only "minimal." (Exhibit D page 49:6-7, 45:17-18, 52:13-26, 53:21-22; See also, Exhibit A page 12:3-8, 14:7-27, 15:1-27, 16:23-24; B page 22:4, 22:10-27, 23:1-27, 24:1-8, 33:17-20, 25:12-13; C page 21:2-4, 22:7-11, 22:16-27, 23:1-11, 23:24-25, 24:4-6, 26:1-2).

As stated above, the Board stated that the psychological report, "Indicates that if [petitioner] were to be release to the community, [petitioner's] risk would be minimal," **not** an "unreasonable risk of danger to the society" as mandated by 15 CCR § 2402, subd, (a) (Exhibit D page 49:5-7; Exhibit E), as such, "findings" that petitioner needs "self-help" is contrary to the records and supports petitioner's assertions that parole hearing was not supported by "some evidence" and "was a shum." (See, In

re Ramirez, 94 Cal.App.4th 549, 571 (2001); In re Smith, 114 Cal.App.4th 343, 369, (2003); In re Scott, 119 Cal.App.4th 871, 896-897 (2004) [same]; Irons, supra, 358 F.Supp.2d at 948 [same]). The reliance on self-help therapy is not supported by "some evidence" that contains "an indicia of reliability" to deny parole denying petitioner due process of law. (See, Superintendent v Hill, supra, 472 U.S. at 456; McQuillion, supra, 306 F.3d at 904; Biggs, supra, 334 F.3d at 915; Scott, supra, 119 Cal.App.4th at 899).

Lastly, the "opposition to a finding of parole suitability" is not some evidence to support a denial of parole as mentioned by the Board. (Exhibit D page 51:1-4). While the Board may consider comments by the district attorney or his representatives, (Penal Code § 3046), **nowhere** in the statutes or regulations does it state that parole should be granted or denied based on the position of the district attorney's office. The decision to grant parole rests on the guidelines listed in 15 CCR § 2400 et. seq., and Penal Code § 3041. (Rosenkrantz, supra, 29 Cal.4th at 658 [there must be "some evidence in the record before the Board [that] supports the decision to deny parole, **based upon the factors specified by statute and regulation**")

CONCLUSION

Recital of the commitment offense and prior commitment offense behaviour that occurred over 15 years ago, as done in petitioner's case for fourth time, is not "some evidence" that contains "an indicia of reliability" that petitioner is "CURRENTLY" would pose an unreasonable risk of danger if release at this time." (Scott, supra, 119 Cal.App.4th at 899; Biggs, supra, 334,F.3d at 915-917; Smith, supra, 114 Cal.App.4th at 370, 372; Dannenberg, supra, 34 Cal.4th at 1070; Shaputis, supra, 37 Cal.Rptr.3d at 334-335).

PRAYER FOR RELIEF

1). That an evidentiary hearing be granted and/or;

2). That the Court order a parole date for release be set for petitioner and that petitioner be release in said date (See, McQuillion v Dunca, 342 F.3d 1012, 1015-1016 (9th Cir. 2003) [return for a new parole hearing before the executive branch would amount to an "idle act" when there is no evidence to deny parole, citing In re Smith, 109 Cal.App.4th at 507] and/or;

3). That the Court order the Board to set a parole date in accordance with this Court's findings;

4). Any other relief this Court may deem just and proper to promote the ends of justice.

Date: 10-25-2006

Respectfully submitted by:

Justo Escalante

Justo Escalante, In Pro Se

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☐ No. If yes, give the following information: N/A

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"): N/A

b. Result N/A c. Date of decision:

d. Case number or citation of opinion, if known: N/A

e. Issues raised: (1) N/A

(2) N/A

(3)

f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known: N/A

N/A

9. Did you seek review in the California Supreme Court? ☐ Yes ☐ No. If yes, give the following information: N/A

a. Result N/A b. Date of decision:

c. Case number or citation of opinion, if known: N/A

d. Issues raised: (1) N/A

(2)

(3)

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: N/A

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

Administrative review no longer exists for challenging parole board hearings

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No. N/A

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or **issue** in any court? [XX] Yes. If yes, continue with number 13. [ ] No. If no, skip to number 15.

13. a. (1) Name of court: Los Angeles County Superior Court

(2) Nature of proceeding (for example, "habeas corpus petition"): Habeas petition

(3) Issues raised: (a) Use Of The Commitment Offense & Conduct Prior To Imprisonment To Deny Parole For The 4th Time Violates Due Process; The Offense Does Not Rise To The Level of "Especially, Heinous or Cruel" Manner To Justify Parole For The 4th Time; There Was No Evidence Showing Petitioner is a "Current" Threat to The Public To Justify A Parole Denial for The 4th Time

(b)

(4) Result *(Attach order or explain why unavailable)*: Denied (See Exhibit G attached at back)

(5) Date of decision: October 2, 2006

b. (1) Name of court:

(2) Nature of proceeding:

(3) Issues raised: (a)

(b)

(4) Result *(Attach order or explain why unavailable)*:

(5) Date of decision:

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:
N/A

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)
No Delay

16. Are you presently represented by counsel? [ ] Yes. [XX] No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? [ ] Yes. [XX] No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:
This petition is properly before this court

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California ti the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and to those matters, I believe them to be true.

Date: 10-25-2006

▶ Justo Escalante

(SIGNATURE OF PETITIONER)